Russia

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1. EXECUTIVE SUMMARY

1.1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration related proceedings in your jurisdiction?

The advantages are:

- arbitral proceedings, and especially court proceedings relating to arbitration such as enforcement or challenge, are comparably swift;
- state courts can issue injunctive relief in support of arbitral proceedings (both Russian and foreign) as long as the content of such injunction does not contradict local procedural traditions;
- local state courts are developing a pro-arbitral approach; and
- high cost efficiency.

The disadvantages are:

- few reputable local arbitration institutions;
- injunctions issued by arbitrators do not have a binding effect upon parties, nor are the parties severely penalised for violating such injunctions, unless the state court issues a mirroring injunction; and
- when it comes to contesting or enforcing an arbitral award state courts might sometimes give a wide interpretation of the public policy or narrow arbitrability of certain disputes, allowing the party which lost the arbitration to benefit from such interpretation.

1.1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive towards arbitration and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number.

We would rate it as 4.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

2.1.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in arbitration in your jurisdiction?

During the last 10 years the popularity of arbitration in Russia has consistently increased. This process has a number of driving factors. One of them is the growing complexity of contracts that are entered by Russian companies (especially in the financial and corporate (SHA) sphere). State courts found it hard to provide professional and adequate consideration of such disputes, thus pushing the market towards arbitration. The other noticeable driver is the concern of the companies over enforceability of state

courts' decisions in different jurisdictions.

Although there is a tendency for foreign institutions (especially LCIA) to be selected in financial and corporate disputes, domestic Russian companies opt for arbitration in Russia in disputes arising out of the international sale of goods, services or construction contracts. Noticeably, an *ad hoc* arbitration is a rare occurrence in Russia, most parties prefer having their dispute solved under the auspices of arbitral institutions.

In the last few years, national arbitration has been strongly backed by the position of Constitutional Court of Russia that directed its efforts at broadening the powers of arbitral tribunals and simplifying the enforcement process. Finally, arbitrating in Russia is significantly more cost efficient than arbitration abroad. Consequently, it is expected that in the near future the share of disputes resolved by Russian arbitral institutions will only increase.

2.1.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?

When describing the unique jurisdictional attributes of arbitrating in Russia, it is worth mentioning the words of a foreign in-house counsel who, having his dispute resolved in Russian state commercial courts, said: 'No wonder local companies are reluctant to arbitrate, your commercial courts are so swift that you will not save time by going to the tribunal'. This judgment is partially true, as it usually takes not more than a year to have the case tried by the three tiers of Russian commercial courts. On the other hand, a quick judgment is not always the best one and the speed of a state court does not overwhelm such advantages of arbitration as simple enforceability or a less formalistic approach to many matters of fact and law. The latter is especially important when Russian state courts are concerned.

Clearly the speed of the state courts also affects local arbitration institutions which prefer avoiding unnecessary delays in the proceedings. Apart from that, arbitration in Russia does not have significant distinctions compared to most progressive jurisdictions. However, as soon as the dispute requires any interaction with state courts the arbitral process becomes affected by a certain amount of local features which should be considered in the process of arbitrating. Mostly these features relate to injunctions, cancellation of the award and its enforcement.

2.1.3 Principal laws and institutions

2.1.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?

International arbitration in Russia (ie arbitration, involving a non-Russian party or a Russian entity with foreign investment) is governed by the law 'On International Commercial Arbitration' dated 7 June 1993 (the 'ICA Law') which provides in the preamble that it is drafted in accordance with the UNCITRAL Model Law (1985, the 'Model Law'). The latest amendments to the Model Law so far have not been introduced to Russia's domestic legislation, but under certain circumstances might be referred to by local courts and tribunals.

Domestic arbitration in Russia (ie arbitration among Russian persons) is conducted in accordance with the Federal law on 'On Arbitration Courts in Russia' issued on 24 July 2002 (the 'ACR Law').

Where the decisions issued in the course of domestic or international arbitration are contested or subject to enforcement, the respective procedures are conducted pursuant to the provisions of Chapters 30 and 31 of the Russian Arbitrazh Procedure Code (the 'Arbitrazh Procedure Code') (if the dispute is commercial) or section 6 of the Russian Civil Procedure Code (the 'Civil Procedure Code') (if a non-commercial individual is party to the dispute). Russia is a party to the Geneva Convention and the New York Convention, so the provisions of the respective Procedure Codes are drafted in order to comply with these international treaties.

2.1.3.2 What are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

The most reputable arbitration institution in Russia – the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC) – was established in 1987 (however some might argue that its predecessor has existed since 1932). Since then, the rules of ICAC, as well as its legal background, have changed significantly but currently it remains the most reputable and experienced arbitral institution in Russia. For instance, the number of disputes tried by ICAC equals the number tried by the LCIA.

The types of disputes that can be considered under the auspices of the ICAC are universe, and there are also a number of specialised institutions. Among them are the Maritime Arbitration Commission which deals with maritime disputes and the National Association of Securities Market Participants (NAUFOR) which specialises in commercial papers disputes.

One of the unusual features of local arbitration practice is that companies and various organisations are free to establish their own arbitral institutions as long as they notify the local state court of their decision. For example, some banks or large corporations have their own arbitral institutions which regularly determine the disputes involving their 'mother company'. This practice has been strongly criticised by the head of the State Commercial Court as the decisions of tribunals formed by non-reputable arbitral institutions can be biased. Subsequently certain decisions of the tribunals that were established by two of the largest companies in Russia – Sberbank and Lucoil – have been cancelled on the grounds that the arbitrators lacked independence when they considered disputes involving affiliates of these companies.

As to the oversight of arbitration, it is worth mentioning that with respect to international commercial arbitration Articles 6, 11, 13 and 14 of the ICA Law provide that the President of the Chamber of Commerce and Industry of Russia (CCI) can intervene in the arbitral process in case the parties face difficulties in appointing the arbitrators or one of the parties challenges the arbitrator.

A different approach is adopted in Russian domestic arbitration. The default rule is that, before the award is issued, no authorities have the power to intervene in the arbitral process. All disputes as to the appointment of arbitrators or jurisdiction of the tribunal are resolved by the arbitrators themselves unless the parties have otherwise agreed. However, in practice most of the rules of arbitral institutions expressly provide that such motions are ruled upon by the president of the institution.

2.1.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?

The Russian court system provides for two judicial bodies: Arbitrazh (Commercial) courts and civil law courts.

Arbitrazh courts supervise arbitral awards if all parties to the dispute are legal entities and/or individuals engaged in commercial activity. Consequently all international commercial arbitration cases are judicially supervised by Arbitrazh courts. For example, where the jurisdiction of the tribunal is challenged, but the arbitrators issue an interim decision that they have jurisdiction, a party might contest such interim decision in the state Arbitrazh (commercial) court (Articles 6 and 16 of the ICA Law (please note that the wording of Article 6 of the ICA Law provides for civil law courts, but this power is in practice performed by Arbitrazh Courts)).

In the event a non-commercial individual is involved in the arbitration, civil law courts would have judicial oversight of such arbitration.

3. ARBITRATING IN YOUR JURISDICTION – KEY FEATURES

3.1 The appointment of an arbitral tribunal

3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators ?

In relation to international commercial arbitration, Russian law does not contain any restrictions on the number of arbitrators nor on parties' freedom to choose arbitrators. Neither is there any mandatory requirement for the arbitrator to be a member of the local Bar. The only relevant legal provision is clause 1 of Article 11 of the ICA Law which provides that no arbitrator can be deprived of a right to arbitrate because of his or her citizenship unless otherwise decided by the parties. Obviously, the arbitral institutions have the right to set their own tests which should be met by the arbitrators, but this is a rather exceptional practice. In most cases, the arbitral institutions provide the parties with a list of suggested arbitrators. Should the parties decide to select an arbitrator from outside of the list, arbitral institutions would most likely request that such party explains its choice and provides evidence confirming the arbitrator's qualifications. In most cases, the necessity to research an arbitrator's background, as well as the delays caused by an institution's approval procedure of the arbitrators, cause the parties to select their arbitrators from the institution's list.

A stricter approach exists with respect to domestic arbitration. Part 2 of Article 8 of the ACR Law stipulates that the sole arbitrator or, in case the dispute is heard by a panel, the presiding arbitrator should have a university degree in law (it is presumed that the degree should be in Russian law). It

is not permitted to appoint as arbitrator anyone with a criminal record or anyone who has been removed from their positions in a law enforcement organisation (including the Bar) in relation to matters incompatible with their professional activities (clauses 5 and 6 Article 8 of the ACR Law).

3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?

The specific general rule of domestic arbitration is that failure to appoint the arbitrator results in termination of arbitration and transfer of the case to the competent state court (clause 4 Article 10 of the ACR Law).

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?

The statutory procedures for appointing the arbitrators exist for both international and domestic arbitrations. The default procedure for international arbitration is that the parties appoint party-appointed arbitrators who within 30 days select a presiding arbitrator. Should one of the parties fail to appoint its arbitrator within 30 days after being notified of arbitration or should party-appointed arbitrators fail to select a presiding arbitrator for more than 30 days, each party to the dispute may ask the President of the CCI to appoint the missing arbitrators. The appointment of arbitrators made by the President of the CCI cannot be contested by the parties.

When the dispute is to be tried by a single arbitrator but the parties fail to agree on that person, the arbitrator can also be appointed by the President of the CCI upon the request of a party to the arbitration.

In domestic arbitration, the standard procedure is that the parties appoint party-appointed arbitrators who within 15 days select a presiding arbitrator. Should one of the parties fail to appoint its arbitrator in 15 days the arbitration is automatically terminated and the dispute is transferred to a competent state court, unless the parties have agreed to an alternative process.

Such appointment procedure allows a party that does not want to arbitrate to avoid going to the tribunal by simply failing to select its arbitrator. Therefore the rules of most domestic arbitration institutions provide for the powers of the president of the institutions to appoint an arbitrator should a party fail to do so.

3.1.4 Are there requirements (including disclosure) for 'impartiality' and/or 'independence', and do such requirements differ as between domestic and international arbitrations?

The requirement of impartiality and independence of the arbitrators is one of the fundamental principles of arbitration. The ACR Law (Article 18) indicates it as a core principle of arbitration while in the ICA Law it is presumed from certain provisions (clause 5 Article 1; Article 12).

Statutory law requires that arbitrators in both international and domestic arbitration disclose to the parties any obstacles preventing them from being

arbitrators (clause 1 Article 12 of the ACR Law; Article 12 of the ICA Law). However, until recently there existed no national guidelines that would help to assess the impartiality of the arbitrators. This matter was resolved in August 2010 when CCI issued the 'Rules on Impartiality and Independence of Arbitrators' which are applicable to both international and domestic arbitrations. Although these rules are only recommended guidelines and do not have a power of statute, their significance can hardly be overestimated. The rules have incorporated most of the principles of the IBA Guidelines and are currently strongly relied on by both arbitrators and courts.

It is worth mentioning that the applicable legal provisions do not oblige the arbitrators to file a statement of independence, as such independence is presumed in the absence of any disclosures of partiality. However, most of the progressive institutions such as ICAC have a long-term practice of collecting statements of independence from their arbitrators before commencement of the arbitral proceedings.

3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

In international as well as in domestic arbitration, the parties are free to agree on the procedure of challenging and removing arbitrators (for example, have the matter resolved by the president of the arbitral institution).

Should there be no agreement among the parties with respect to the procedure of challenging arbitrators, statutory provisions apply. Unfortunately, the existing statutory regulations on the process of challenging arbitrators are quite ambiguous and sometimes provide room for different interpretations. Therefore the below analysis is a summary of the most likely, but not the only possible, interpretation of the statutory procedure of challenging arbitrators.

The procedures for challenge are similar in international and domestic arbitration. A party has the right to challenge the arbitrator within five days in national and 15 days in international arbitration on learning that the arbitrator is not qualified enough to arbitrate or does not meet the criteria of impartiality (clause 5 Article 12 of the ACR Law; Article 13 of the ICA Law). The arbitrator can step aside voluntarily and a replacement arbitrator will be appointed. Where the arbitrator refuses to leave the panel and the other party to the proceeding supports the challenge, the powers of the challenged arbitrator are removed. But where neither the arbitrator, nor the other party support the challenge, the respective application is resolved by the remaining two arbitrators. If the case is tried by a single arbitrator, any motion for challenge would be considered by such arbitrator himself or herself.

One thing the parties cannot modify in international arbitration is the right of a party to file a complaint with the President of the CCI, should the attempts of such party to challenge the arbitrator fail. The respective complaint can be filed within 30 days after removal of the arbitrator is refused under the applicable procedure. Acting as a last instance in challenging the arbitrator, the president of CCI has the power to overrule all previous decisions on the matter (clause 1 and 3 Article 13 of the ICA Law).

Where arbitrators are unable to fulfil their functions or cannot fulfil them without unreasonable delays, the arbitrators can remove themselves from the panel or have the parties agree on their removal.

3.1.6 What role do national courts have in any such challenges?

In Russia the state courts do not have jurisdiction to consider disputes over the challenge and removal of arbitrators.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

Currently, there is no law or court practice in Russia which would provide for liability of arbitrators for acts related to their decision-making function.

3.2 Confidentiality of arbitration proceedings

3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

The ACR Law, governing domestic arbitration, provides for confidentiality of the arbitration as one of its core principles (Article 18 of the ACR Law). However, Article 22 of the ACR Law gives it a very narrow interpretation, imposing a confidentiality obligation only on arbitrators. They are not allowed to disclose information that they became aware of during the course of the arbitration. Moreover, even law enforcement authorities are prohibited from interrogating arbitrators as witnesses on arbitration-related matters. At the same time, the breach of the confidentiality duty would unlikely lead to any liability of arbitrators, as there is no specific regulation for confidentiality violations except for the vague possibility of a damages claim.

Legislation on international arbitration does not provide for any duty of confidentiality at all. In order to compensate for this, most reputable arbitral institutions dealing with international commercial arbitration include a confidentiality obligation in their rules. For example, paragraph 25 of the ICAC Rules of Arbitration impose a confidentiality obligation not only on the arbitrators but on the staff of the ICAC and CCI, as well as on the experts, that were introduced to the proceedings by the ICAC. However, even such rules do not impose any confidentiality duty on the parties.

3.2.2 To what matters does any duty of confidentiality extend (eg does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

The formal duty of confidentiality imposed on arbitrators in domestic arbitration extends to all facts relating to the arbitration, including the award. Although there is no unanimous understanding of whether it covers the existence of arbitration, it is an accepted practice among arbitrators not to disclose any details about pending proceedings.

Given that there is no statutory duty of confidentiality in international commercial arbitrations, the respective issue is completely within the competence of the arbitral institution that hosts the arbitration.

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

The Russian statutory law does not prevent the parties to arbitration from using the documents that were disclosed in arbitration.

It is worth saying that Russian law operates under the presumption that state bodies should not accept as evidence, documents which were received in violation of the statutory law (eg part 3 Article 64 of the Arbitrazh Procedure Code; part 2 Article 55 of the Civil Procedure Code, etc). Hence even should the parties or the arbitral institution impose a stricter confidentiality test than that provided by the law, this would not be a statutory provision and the documents would still be accepted by state bodies. In theory, a breach of the confidentiality provision might result in a damages claim, but so far there has been no such practice in Russia.

3.2.4 When is confidentiality not available or lost?

Though confidentiality is not significantly protected by active legislation, most arbitral institutions make efforts to prevent third parties from accessing the proceedings. Hence, if the parties do not give publicity to the dispute the case has good chances of remaining confidential.

Unfortunately, everything changes if one of the parties files any arbitration-related application with a state court (a motion for injunction in support of arbitration, a challenge of the jurisdiction of a tribunal, an application for cancellation of the award, etc). The respective notice is immediately displayed on the website of the court. Any request filed with the court should be supported by copies of documents that are crucial for the arbitration. Moreover, the court (when the award is being contested or enforced in state court) upon its own initiative may request all files of the arbitral case which would have to be provided by the tribunal. Given that state court oral proceedings are open to the public and under certain conditions journalists have a right to review the case files, confidentiality of the arbitral dispute may be lost. One can make an attempt to have the state court close the proceeding for the public, but these requests are seldom granted in commercial disputes.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

State courts should not consider the claim if the same issue is being currently tried by arbitration or is subject to arbitration pursuant to the parties' agreement (part 1 Article 148 of the Arbitrazh Procedure Code; Article 222 of the Civil Procedure Code).

Hence in order to have the state court dismiss the proceedings in favour of arbitration, one should prove that there is a valid agreement to arbitrate between the parties.

Though Russian procedural law does not contain direct provisions authorising a state court to stay the proceedings pending the arbitration,

one may interpret part 5 Article 144 of the Arbitrazh Procedure Code or Article 215 of the Civil Procedure Code as allowing such a stay when arbitration should establish facts that would impact the proceedings that are currently pending before the state court. Unfortunately, the courts use this interpretation when the proceedings are to be stayed pending domestic arbitration, but they are generally reluctant to stay the action in favour of international arbitration.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

Russian procedural law does not contain provisions that would allow the state court to stay arbitral proceedings. Given that the state courts have a very careful approach towards issuing injunctions, it is improbable that the state court would agree to issue an order for a stay of arbitration.

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

Breach of the agreement to arbitrate would allow the opposing party (the defendant) to file an application to dismiss the claim (part 1 Article 148 of the Arbitrazh Procedure Code; Article 222 of the Civil Procedure Code). Such an application should be made before any submissions on the merits are filed by the defendant. Failure to comply with this requirement would imply the defendant's consent to the jurisdiction of the state court.

Having received the application for dismissal, the court examines the arbitration clause and, should it be valid and binding upon the parties, dismisses the claim on procedural grounds without researching the merits of the case. Such dismissal does not prevent the claimant from subsequently refiling the claim with the tribunal or with the state court if parties fail to conduct arbitration.

3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

On 26 May 2011, the Constitutional Court of Russia issued Statement No. 10-P in which it strongly supported the extension of arbitrability of certain matters (such as immovable property disputes) and demonstrated that any attempts to narrow the competence of arbitral courts would contradict the constitution. This Statement, being binding for the state courts as well as for the state authorities, is considered to be manifest of a pro-arbitral policy of the Constitutional Court.

But even before the discussed Statement was issued, the involvement of state courts in the arbitral process was rather moderate. Current wording of the procedural codes, combined with the unwillingness of the state courts to interfere in the unfamiliar sphere of the arbitral process, has allowed tribunals to conduct proceedings with negligible risk of state court intervention.

However, if one of the parties initiates concurrent proceedings in the state court, the latter would rule on arbitrability of the dispute when resolving the motion to dismiss the proceedings due to the existence of the arbitral agreement. Such decision will not directly affect the arbitral proceedings but might render the award unenforceable if the court finds that the dispute is not arbitrable.

Even if there are no concurrent state court proceedings, there is a certain permanent risk of unenforceability or successful challenge of the award due to the position of the state courts on such matters as public policy, partiality of arbitrators or improper composition of the tribunal. Nevertheless, the proportion of disputes involving the cancellation or enforcement of arbitral awards in the overall amount of awards is rather modest. According to the unofficial statistics of ICAC less than 15 per cent of cases are subsequently contested in state courts and with little success.

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

Russian procedural law provides for the same condition of enforcement of an arbitral award as are set forward in the New York Convention. However, in order for the Russian court to assume jurisdiction over the enforcement proceedings the applicant would need to prove that either the respondent or its assets are located in Russia. One should also note that the arbitral awards are enforceable in Russia only during the three-year period after they entered into force (part 2 Article 246 of the Arbitrazh Procedure Code; part 1 Article 412 and part 3 Article 409 of the Civil Procedure Code).

3.4 Procedural flexibility and control

3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

The default legislative rules governing arbitration are provided in the fifth chapters of the ICA Law and the ACR Law. Both statutes grant very broad autonomy to the parties as regards the procedure of arbitration. Parties may agree not to have oral hearings, limit the amount of the filings, have an open or closed hearing, etc. The core principles of arbitration, such as equal treatment of parties and proper notification of the hearings, however, cannot be varied by the parties' agreement.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

The parties are free to define the seat of arbitration (Articles 20 of the ICA Law and ACR Law). Any failure to do so enables the tribunal to select the most appropriate seat giving consideration to the convenience of the parties. In international arbitration the physical location of arbitration may be different from its legal seat (point 2 Article 20 of the ICA Law).

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

The default obligations of the tribunal are to assure a just consideration of the dispute, equal treatment of the parties and proper notification. The ACR Law also provides for a duty of confidentiality of arbitrators.

The default procedural powers of the tribunal in both international and domestic arbitration are more extensive. Besides basic administrative and judicial powers, the arbitral tribunal can also issue injunctive relief (upon the parties' request), request that parties provide evidence and order the provision of expert evidence.

3.4.4 Evidence

3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?

Written evidence is provided by the parties in the amount and form that the respective party finds appropriate. Should the tribunal decide that the provided evidence is insufficient, the arbitrators may suggest that the party submits further documents, however this request is not binding.

Unless otherwise stipulated by the parties, the process of gathering evidence does not vary depending on the stage of the proceedings.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?

Russian law is unfamiliar with a concept of disclosure; the parties are invited to provide evidence that they consider appropriate, but are not penalised for not providing evidence which could be used against them, unless such evidence is called for by the state court.

3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?

There are no default international or domestic arbitration rules on factual witnesses. Should a potential witness attend the hearings, such person can be interrogated by the tribunal and cross-examined by the parties. Respective oral and written statements are considered evidence in the case. If the tribunal finds that certain witnesses should be cross-examined it can call such person, but the latter would not bear any legal responsibility for not attending. As a matter of practice neither Russian courts nor tribunals are willing to make efforts to call witnesses if the latter are reluctant to appear before them.

As to the expert witness, there are no default rules on the parties' right to provide expert opinions on various issues raised in arbitration. Consequently, such opinions should be treated as any other evidence procured by the parties. Articles 26 of the ICA Law and ACR Law provide that the tribunal might appoint an expert who should provide the tribunal with an independent opinion. The parties are expected to cooperate with the expert, but they reserve the power to cross-examine him or her during the hearing.

3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations or as between orders sought against parties and non-parties?

Unlike state courts, tribunals do not have the power to order parties or third persons to provide evidence. According to Article 27 of the ICA Law an international arbitration court may ask a Russian state court to call evidence, ie issue an order for the provision of documents that are necessary for resolving the dispute in arbitration. Unfortunately, the procedural rules which are binding for the state courts do not set out the procedure for calling evidence for arbitration. In the absence of such guidelines, the state courts are reluctant to grant a tribunal's request for evidence.

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (ie bilateral or multilateral investment treaties)?

There are no statutory provisions stipulating the appointment of arbitrators in disputes arising out of international treaties. The general rule, allowing the parties to agree on the procedure of appointing arbitrators, applies.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

Current legislation and arbitral practice provide that, unless the parties agree otherwise, the representatives of the parties are only required to have a power of attorney from the respective parties. Parties can also be represented by a person acting *ex officio*, provided that such person can confirm his or her standing in the company through relevant corporate documents. However, these liberal rules might be subject to modification during 2012 as a result of Russia's accession to the World Trade Organization and potential changes to internal legislation.

3.5 The award

3.5.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who fails to appear at the arbitral proceedings?

According to Article 25 of the ICA Law, unless the parties agree otherwise, where a properly notified party fails to appear before the tribunal, the latter can consider the dispute and issue an award in absence of such party. Should the claimant, however, fail to provide a statement of claim, the case should be terminated with no award being issued. On the other hand, if the respondent fails to provide the statement of defence, the tribunal may issue an award based on the facts as stated in the statement of claim. However the respondent's failure to object to the claimant's arguments should not imply its consent to the statement of claim.

Similar provisions exist for domestic arbitration save for two exceptions: (1) the black letter of the ACR Law (namely Article 28) does not provide

parties with the autonomy to modify the arbitral tribunal's ability to determine the controversy in the absence of a party; and (2) there are no provisions regarding the power of a tribunal to terminate proceedings if the claimant fails to provide a statement of claim (however this power of the tribunal should be presumed).

As to motions for a last minute adjournment of the hearing, there are no specific legal provisions governing this matter. In practice the tribunals are supportive of parties' applications for more time, unless there is clear abuse of this right on behalf of the applicant. Some arbitral institutions have guidelines as to the time for consideration of the dispute, for example, the ICAC Rules suggest that the dispute be heard in no more than 180 days (paragraph 24 of the ICAC Rules) (this period can be however extended). If a last minute motion to adjourn were filed so that the tribunal would be unable to comply with a timeframe for the case, the arbitrators would obviously be less interested in granting an adjournment.

3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, eg punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?

There are no statutory limits as to the arbitrators' power to fashion appropriate remedies so long as these remedies are supported by applicable law. However, where the remedies provided in the award are unfamiliar in Russian law (such as, *inter alia*, punitive damages) there is a risk that the state court would find such award contradictory to Russian public policy.

3.5.3 Must an award take any particular form or are there any other legal requirements, eg in writing, signed, dated, place stipulated, the need for reasons, method of delivery, etc?

The rule set by Article 31 of the ICA Law and Article 33 of the ACR Law provides that the award should be made in writing and signed by all or the majority of arbitrators, even if one of the arbitrators has a dissenting opinion (the latter should be annexed to the award). The award should indicate the date of the award; place of arbitration; the names of the arbitrators and the order in which the panel was formed; the parties and their addresses; justification of tribunal's jurisdiction; summary of the arguments; motions of the parties; evidence on which the award is based and legal justification thereof; and the allocation of costs. The award should be delivered to the parties or their representatives by post or picked up from the arbitral institution by the respective parties' representatives.

3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

Article 15 of the ACR Law provides a clear guideline for what can be considered as costs of domestic arbitration (legal fees, travelling expenses, expert fees, arbitrators expenses, etc). Article 16 of the ACR Law stipulates that the costs should be borne by the parties pursuant to their agreement.

Should there be no such agreement, the costs are divided proportionally to the amount of the claim awarded. Hence, should the claim be granted in full, the respondent would have to carry all costs. It is worth mentioning, however, that the tribunal would most likely refuse to compensate any expenses it finds unreasonable.

ICA Law on international arbitration has no provisions for the allocation of costs. However, it is widely recognised that the parties' agreement as to costs is to be observed, and, should there be no such agreement, all reasonable costs incurred by the winning party are to be compensated by the losing party.

3.5.5 What matters are included in the costs of the arbitration?

ACR Law provides for the following expenses to be included in the costs of domestic arbitration: arbitral fees, expenses of arbitrators, fees of experts and interpreters, expenses incurred in order that the arbitrators examine any evidence which could not be delivered to the place of arbitration, factual witness expenses, legal fees, expenses for technical and administrative support of arbitration and other expenses (Article 15 of the ACR Law).

Though there are no direct legal provisions on costs in international arbitration, a respective tribunal would most likely share the same interpretation of costs as provided in the ACR Law.

There is no uniform position among arbitrators regarding the recovery of costs of corporate counsel or business executives of the companies. Although this possibility exists from the legal perspective and is sometimes recognised in scholarly works, the final decision on the matter would depend on the personal opinion of the members of the panel.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

Although there are no legal limitations on the recovery of costs in arbitration, the tribunals are most likely to apply the test of reasonableness as to the amount of incurred costs. Hence the tribunals would refuse to recover costs that they find unreasonable. For example the ICAC has a practice of recovering legal fees equalling 10 per cent of the awarded amount, but spending more on legal assistance would most likely be considered unreasonable.

3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

Unfortunately, there is no unanimous position among state tax authorities and courts as to whether VAT (currently 18 per cent) should be applied to the arbitral fee. The position of the CCI is that the arbitral activity is a judicial activity and therefore is exempt from VAT under section 17 Article 145 of Russian Tax Code. However, this approach might not completely correspond to the Statement of the Constitutional Court of Russia of 26 May 2011 No. 10-P which established that arbitral activity cannot equal judicial

activity, which is performed by state courts only. The Russian Tax Service also has considerable doubts as to whether arbitration is exempt from VAT. It issued a number of letters, claiming that VAT is payable from the amount of the arbitral fee. In the current practice, arbitral institutions do not pay VAT, but it might happen that at some point the Tax Service would decide to create court practice in this respect and change the status quo.

The income which was received by arbitrators as a result of their activity is subject to income tax which is currently at the rate of 0.13 per cent (30 per cent for tax non-residents).

Assuming that VAT is payable, the arbitrators may indicate that the amount of an arbitral fee includes VAT hence making it part of arbitral costs.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form and/or content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

In both domestic and international arbitration (Articles 7 of the ICA Law and ACR Law), the arbitration agreement should be made in writing. Such agreement is concluded if it is incorporated in the document signed by both parties or was entered into in a way of exchange of letters or any means of electronic communication. Unfortunately, because of the specifics of Russian law, it has been difficult so far to prove the existence of an arbitration agreement concluded by way of email exchange. The situation should change in the course of amendment of arbitral legislation encouraged by the Model Law 2006 amendments.

A reference made in a contract to a document containing an arbitration clause also constitutes an arbitration agreement if such reference provides that the arbitration clause should be made part of the contract.

Arbitration agreements can also be concluded in arbitration proceedings when one party claims that there is an arbitration agreement among the parties and the other party does not object thereto.

As to the wording of the clause, the best option is to include a standard arbitration clause of an arbitral institution. Otherwise it is advisable that all provisions of the arbitration clause which have reference to actual people or places (for example, the names of arbitrators or the physical place for a hearing) should be sufficiently detailed, such as to include full names and exact positions for people, precise addresses, etc. Russian courts that subsequently examine the arbitration clause might find certain provisions of the clause invalid if they do not conform to a high threshold of precision.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

Article 16 of the ICA Law and clause 1 Article 17 of the ACR Law clearly provide for severability of arbitration clauses and provide that invalidity of the contract in which the clause is included does not entail invalidity of the arbitration clause.

3.6.3 Can an arbitral tribunal determine its own jurisdiction ('competence–competence')? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?
Statutory rules applicable to both international and domestic arbitration allow the tribunal to determine its own jurisdiction. A party should object to the jurisdiction of the tribunal before filing its first statement on the facts of the case, otherwise its consent regarding jurisdiction is implied (clauses 1 and 2 of Article 16 of the ICA Law and clauses 1 to 3 of Article 17 of the ACR Law).

In domestic arbitration the tribunal can rule on its jurisdiction. The decision on jurisdiction should have the form of a ruling (interim decision). Such ruling cannot be contested in local court. However, if the tribunal did not have jurisdiction and a party objects to the final award on the grounds of a lack of jurisdiction, the final award could be cancelled in a state court or refused enforcement.

In international arbitration, the tribunal would have the power to decide on its jurisdiction either in a ruling or in a final award. Should the tribunal issue a ruling that it has jurisdiction, a party to arbitration can contest such ruling in a state Arbitrazh court within 30 days after having learned about it (Article 16 of the ICA Law; Article 235 of the Arbitrazh Procedure Code). While the proceedings in state court are pending, the tribunal may proceed with the arbitration and issue an award.

3.6.4 Is arbitration mandated/prohibited for certain types of dispute?
There are no statutory rules mandating arbitration for certain kinds of disputes. At the same time, arbitration is prohibited for all disputes arising out of public law relations such as tax disputes, invalidation of administrative and legislative acts, etc. According to clause 3 Article 33 of the Russian Bankruptcy Law, a bankruptcy case cannot be transferred to arbitration. State courts also tend to interpret Article 225.1 of the Arbitrazh Procedure Code as providing for exclusive jurisdiction of state courts over certain corporate disputes. Namely, disputes over shareholders' agreements that regulate the issue of shares or management of the company would most likely be considered non-arbitrable. For a considerable time Russian state courts took a position that real estate disputes are not arbitrable as well, but the position of the Constitutional Court expressed in Statement No. 10-P has reversed this practice.

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?
In Russia, the limitation period is a matter of substantive law, hence the limitation periods for filing claims with state courts and arbitrations would be the same. According to Article 196 of the Civil Code the general limitation period is three years, however, certain claims have special limitation periods. For example, a voidable transaction can be invalidated only within one year after the claimant learned about its existence and the grounds for invalidity. The same term is set for certain disputes regarding transportation agreements and there is a two-year term for some types of insurance disputes, etc.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?

In Russia the tribunals are not allowed to assume jurisdiction over third persons who are not party to the arbitration agreement unless such parties consent to being joined.

3.7 Applicable law

3.7.1 How is the substantive law governing the issues in dispute determined?

In international arbitration, the substantive law applicable to the dispute is determined by the tribunal pursuant to the parties' agreement, giving consideration to trade customs and habits. Should there be no agreement among the parties, the applicable law is to be defined according to the conflict of law rules which the tribunal finds appropriate (Article 28 of the ICA Law). Most likely Russian conflict of law rules would be applied.

Only Russian national law is applicable to domestic arbitration disputes (Article 6 of the ACR Law).

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

When considering a case, Russian tribunals tend to comply with a number of major mandatory rules set by Russian law, even when Russian law is not applicable to the dispute. Such provisions are presumed to have special significance for protecting the rights of the parties, including, *inter alia*: prohibiting the abuse of rights (Article 10 of the Civil Code); written form of a contract with a foreign party (Article 162 of the Civil Code), etc. The tribunal might also find it necessary to apply the respective major mandatory rules of law of the place where the award would have to be enforced.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1.1 Can an arbitral tribunal order interim relief? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

Article 17 of the ICA Law and Article 25 of the ACR law allow the tribunal, unless the parties agree otherwise, to issue an injunctive relief upon a party's application. The only test that needs to be met is that the tribunal should find this relief 'necessary'. Unfortunately, the parties cannot be prosecuted for disobeying the relief ordered by the tribunal.

Russian tribunals are usually not willing to issue injunctive relief as such relief is not legally binding upon the parties so there is little arbitral practice in this respect. Although the tribunals are, in general, free to select the interim relief they find most appropriate, most orders of this kind are orders to provide a bank guarantee. However, the situation may change after the latest amendments to the ICA Law (following the Model Law amendments in 2006) are enacted. The Russian parliament is deliberating this issue and one of the prevailing ideas is that the tribunals should be allowed to issue injunctions that could be enforced by the parties.

4.1.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

The Russian state courts do not limit tribunals' powers to issue interim measures but nor do state courts recognise arbitral interim relief as binding upon the parties. A party may, however, request that the court issues interim relief 'mirroring' (eg being identical to) that of a tribunal.

4.1.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

The Russian law on arbitration (namely Article 25 of the ACR Law) and procedural law (part 3 Article 90 of the Arbitrazh Procedure Code) provide state courts with powers to issue injunctive relief in support of arbitration. Current court practice displays a growing amount of such relief. In order to obtain an injunction, a party should prove that, unless the injunction is issued, the award might not be performed by the opposing party or, without this relief, the requesting party would suffer damages.

In order to convince the state court that the application should be granted it may be helpful, but not necessary, to have the tribunal issue a similar injunction beforehand. The court is usually more willing to issue an injunction that would mirror the one issued by the tribunal.

4.1.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

Russian statutory provisions governing the procedure of issuing injunctive relief in support of arbitration do not draw a distinction on the grounds of the seat of arbitration. For example, in 2010/2011 a number of injunctions were issued by the Russian courts in support of London-seated LCIA proceedings.

5. CHALLENGING ARBITRATION AWARDS

5.1.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

The award of a tribunal which has its legal seat in Russia can be challenged in the state courts. Such application would need to be filed with a first instance court: either the Arbitrazh court (Articles 230 and 234 of the Arbitrazh Procedure Code) or the Civil Court (Articles 418 and 422 of the Civil Procedure Code).

The award should be set aside by the Arbitrazh or Civil court if: the arbitration agreement is invalid; a party to the proceedings was not properly notified; the tribunal exceeded its jurisdiction; the composition of the tribunal or arbitral procedure did not conform to the agreement of the parties or the law; the dispute is not arbitrable; or the award contradicts the public policy of Russia (Article 233 of the Arbitrazh Procedure Code; Article 34 of the ICA Law; Article 421 of the Civil Procedure Code; Article 42 of the ACR Law).

5.1.2 Can the parties exclude rights of appeal or challenge?

Article 40 of the ACR Law provides that, in case of domestic arbitration, parties may agree to exclude the right to challenge the award.

So far, there are no similar provisions in the ICA Law. However, the amendments to the ICA Law that are currently discussed, suggest that similar wording be included therein. Currently, the court practice on this matter is rather diverse. Several years ago the High Arbitrazh Court of Russia stated that the state court should not consider the application to challenge the award if the parties agreed that the latter is final and binding. However, in a number of recent decisions, the lower courts emphasised that the awards of the tribunals acting under ICA Law can be challenged to state courts even if the parties previously agreed otherwise.

5.1.3 What are the provisions governing modification, clarification or correction of an award (if any)?

Where an award did not address certain claims of the parties which were raised during the arbitration, the parties can file a request to issue an additional award, addressing these matters. Additionally, a party may ask to clarify the award. The respective applications should be made within 10 days with regard to domestic arbitration (Articles 34 and 35 of the ACR Law) or 30 days with regard to international arbitration (Article 33 of the ICA Law) after a party receives the award.

6. ENFORCEMENT

6.1.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

Russia has ratified the Geneva Convention and the New York Convention without reservations. However, with respect to the awards issued by the tribunals of countries that are non-parties to the convention, the provisions of the convention should be applied on the grounds of reciprocity.

Russia is also party to a CIS agreement on the Order of Resolving Disputes Arising out of Commercial Activity (the 'Kiev Agreement 1992').

6.1.2 What are the procedures and standards for enforcing an award in your jurisdiction?

An application to enforce an arbitral award should be filed by the winning party with a competent first instance state court which has jurisdiction over the place where the losing party is located. The black letter of the ICA Law and the ACR Law provides that the application for enforcement can be filed at the place where the losing party has assets only when the location of such party is unknown. However, it is widely recognised that, should the foreign losing party have assets in Russia, an award can be enforced by a competent court at the place where the assets are located.

In order to enforce the award, the applicant should provide the court with an original of the arbitration clause and the award (or their certified copies). The court may refuse enforcement of the award on the same grounds that allow the court to cancel the award (please see section 5.1.1) or if the applicant fails to comply with formal requirements for the filing (eg failed to

annex a translation of the award, etc). The first instance court decision can be appealed to a higher court.

The first instance court usually rules on enforcement within two to three months and the respective ruling immediately comes into legal force. Should it be appealed, the appeal must be resolved in two to three months. However, if the opposing party seeks to delay, the proceedings may last several months longer. If the opposing party is a foreign company with no presence in Russia the court might need to notify such party under the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Convention as of 15 November 1965) or other applicable treaties. The proceedings would therefore be delayed for an additional six months.

The costs of enforcement proceedings are usually lower than for classic litigation. In general, legal fees for enforcement of one award, depending on the counsel, would amount to EUR 15,000. This amount can however increase if, for example, it is revealed that the tribunal violated certain procedural requirements, exceeded jurisdiction, or the counter party initiated concurrent court proceedings, etc.

6.1.3 Is there a difference between the rules for enforcement of 'domestic' awards and those for 'non–domestic' awards?

Russian procedural law does not draw a significant distinction between the enforcement procedure of domestic and international awards.

Singapore

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1. EXECUTIVE SUMMARY

1.1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration related proceedings in your jurisdiction?

The advantages that Singapore possesses as a forum for international arbitration include the following:

- Singapore's arbitration law, in respect of both domestic and international arbitrations, is closely modelled on the UNCITRAL Model Law (the 'Model Law'). As such, it will be familiar to experienced arbitration practitioners and corporate counsel alike. It prioritises party autonomy and limited curial intervention;
- the courts are generally very supportive of arbitration and will generally, and must in respect of international arbitrations, stay judicial proceedings brought in relation to a dispute that is the subject of a valid arbitration agreement;
- Singaporean arbitral tribunals can have extensive powers to order interim measures. These powers are supported by the courts which may also order interim measures in circumstances where a tribunal is unable to act. Following recent legislative amendments, the courts' powers extend to issuing interim relief in support of foreign arbitrations;
- a number of prominent arbitral institutions are present in Singapore and can administer arbitrations conducted there. These include the Singapore International Arbitration Centre (SIAC), the PCA, the ICC and the AAA;
- Singapore is a party to the New York Convention and its provisions have been incorporated into domestic law. The courts have generally applied the Convention with a pro-enforcement bias but have been prepared to refuse to enforce awards where any of the grounds for refusing enforcement have been made out; and
- judicial decisions in arbitration-related matters are routinely published and are easily accessible.

1.1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive towards arbitration and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number.

Overall, Singapore is a jurisdiction that is highly supportive of arbitration and deserves a ranking of 5.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

2.1.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in arbitration in your jurisdiction?

The past two decades have seen a remarkable increase in both international and domestic arbitration in Singapore. In respect of international disputes, this has been largely due to the vigorous promotion by the Singapore government of Singapore as a forum for international arbitrations. The government's intention is to position Singapore as a global hub for international arbitration and as the pre-eminent forum in Asia.

As part of the government's initiatives, the legal services sector has been liberalised so as to permit foreign firms practising in Singapore to conduct international arbitration work; tax incentives have been made available for lawyers and arbitrators conducting arbitrations in Singapore; and work passes for arbitration/mediation professionals have been waived. It is also the policy of the government to intervene swiftly whenever legislative changes are required in order to enhance arbitration in Singapore.

More recently, the government has established Maxwell Chambers (*www.maxwell-chambers.com*), a dedicated centre for international dispute resolution, which provides a prestigious venue for international arbitration in Singapore, as well as a home for various international arbitral institutions. Two sets of London barristers' Chambers specialising in international arbitration have also established offices at Maxwell Chambers.

In 2012, SIAC will host the ICCA Conference.

An important factor which has contributed to the growth of international arbitration in Singapore is the policy underlying its arbitration law, and implemented by the courts, of limited and cautious judicial intervention in, and maximum support for, the arbitral process. Recent examples of this policy include:

- *Tjong Very Sumito v Antig Investments Pte Limited* [2009] SGCA 41: the notion of an arbitrable 'dispute' is to be construed broadly, and the court will readily find that a dispute exists unless the defendant has unequivocally admitted that the sum is due and payable; indemnity costs awarded against a party seeking to avoid arbitration. The Court of Appeal noted in this case that 'an unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore'; and
- *AJT v AJU* [2011] SGCA 41: the Court of Appeal overturned the decision of the High Court to set aside an award that a settlement agreement was enforceable on grounds that the agreement was illegal and, therefore, enforcement of it was in breach of public policy. The Court of Appeal held that the alleged conflict with public policy did not permit the High Court to set aside the Award and reconsider the findings made by the tribunal.

The government is presently considering further amendments to the international arbitration laws. These include: conferring power on the courts to review negative jurisdictional rulings made by arbitral tribunals; the recognition of arbitration agreements concluded orally or by conduct, as long as the content is recorded in some form; the enforceability of

awards made by emergency arbitrators; and the clarification of the power of tribunals to award interest.

2.1.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention??
Singapore is a very pro-arbitration jurisdiction, particularly in respect of international arbitration. This has been emphasised by recent legislative amendments such as those made in 2010 to confirm the powers of Singapore courts to order interim relief in support of foreign arbitrations and also earlier amendments made in 2002 which reinforced party autonomy by providing that any arbitration rules adopted by the parties would be given full effect subject only to any mandatory rules in Singapore's international arbitration law.

2.1.3 Principal laws and institutions
2.1.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?
Singapore has a dual system for international and domestic arbitration. The International Arbitration Act 1994 (rev. 2002) (IAA) governs international arbitrations which are those which have a substantial international element by virtue of the location of the parties' places of business or the nature of their commercial relationship.

The IAA incorporates the Model Law into Singapore law subject to certain innovations. It retains the core principle that the courts shall not intervene in international arbitrations save in limited circumstances. The IAA also provides for the recognition and enforcement of foreign arbitral awards and effectively incorporates the provisions of the New York Convention.

The Arbitration Act 2001 (rev. 2002) (AA) governs domestic arbitrations which are arbitrations that are seated in Singapore but to which the IAA does not apply. It is largely based on the Model Law but with a number of significant modifications which permit a greater degree of judicial intervention in the arbitration process and greater scope for recourse to the courts against an award.

The Arbitration (International Investment Disputes) Act (Cap 11) empowers the High Court to recognise and enforce arbitral awards made under the ICSID Convention.

2.1.3.2 What are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?
SIAC, the Singapore Institute of Arbitrators (SIArb), and the Singapore Chamber of Maritime Arbitration (SCMA) are the principal arbitral institutions and each is a 'partner' of Maxwell Chambers. In addition, several other international institutions have established a presence in Singapore including the ICC, the PCA, WIPO and the ICDR/AAA.

SIAC (*www.siac.org.sg*) is a non-profit organisation that has a dual role. It is one of the premier international arbitration institutions in Asia, aiming to

provide a neutral, efficient and reliable dispute resolution service. Its Rules are based largely on the UNCITRAL Arbitration Rules and the Rules of the London Court of International Arbitration. The Chairman of the SIAC is also designated under the IAA as the appointing authority where the parties fail to agree on a procedure for the appointment of their tribunal or where any agreed procedure breaks down.

SIArb (*www.siarb.org.sg)* is a private organisation that undertakes training and accreditation of arbitrators. In addition, it acts as an appointing authority for the appointment of arbitrators (where called upon, by agreement, to do so).

SCMA (*www.scma.org.sg*) was reconstituted in May 2009 as an entity separate from the SIAC. It aims to provide a framework for maritime arbitration that is responsive to the needs of the maritime community.

These institutions apart, parties to arbitrations in Singapore frequently adopt the UNCITRAL Arbitration Rules, and arbitrations under the ICC Rules are also commonplace.

2.1.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?

The High Court has judicial oversight of Singapore arbitrations under both the IAA and the AA. Since 1 November 2004, three judges of the High Court have been designated to hear all applications to the High Court arising from arbitrations under these two Acts. This reflects the strong policy support for arbitration and, by providing a body of reliable case law, the courts have contributed significantly to Singapore's attempts to achieve prominence as a centre for international arbitration.

3. ARBITRATING IN YOUR JURISDICTION – KEY FEATURES

3.1 The appointment of an arbitral tribunal

3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators?

Singapore arbitration law does not impose any restrictions on the parties' freedom to choose arbitrators, even where the arbitration involves questions of Singapore law: Legal Profession Act section 35(1). Restrictions based on nationality are prohibited, unless the parties otherwise agree: Model Law Article 11(1); AA section 13(1). Parties are, however, free to agree that arbitrators must have certain professional qualifications. Parties are also free to determine the number of arbitrators. However, if they fail to do so, there shall be a single arbitrator: Model Law Article 10 read with IAA section 9; AA section 12.

3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?

See section 3.1.3 below.

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?

Parties are free to agree on a procedure for the appointment of their arbitral

tribunal: Model Law Article 11(2); AA section 13(2). Failing such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator and the parties shall by agreement appoint the third arbitrator, and in an arbitration with a sole arbitrator, the parties shall agree on the arbitrator. If a party fails to appoint its arbitrator, if agreement cannot be reached either on a third arbitrator or a sole arbitrator, or if there is some other breakdown in the appointment procedure, then the appointment shall be made, on the request of a party, by the appointing authority: Model Law Articles 11(3) and (4) read with IAA section 9A; AA sections 13(3) and (4). The appointing authority in respect of both domestic and international arbitrations is the Chairman of the SIAC: IAA section 8(2); AA section 13(8).

3.1.4 Are there requirements (including disclosure) for 'impartiality' and/or 'independence', and do such requirements differ as between domestic and international arbitrations?

In respect of international arbitrations, Article 12(1) of the Model Law provides that when a person is approached to be an arbitrator, he or she must disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality. It further provides that an arbitrator, from the time of appointment and throughout the arbitral proceedings, must without delay disclose any such circumstances to the parties unless he or she has already made disclosure thereof. Sections 14(1) and (2) of the AA mirror these provisions for domestic arbitrations.

3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

See section 3.1.6 below.

3.1.6 What role do national courts have in any such challenges?

Article 12(2) of the Model Law provides that an arbitrator may be challenged only if circumstances give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed by the parties. A party may challenge an arbitrator appointed by it, or in whose appointment it participated, only for reasons of which it becomes aware after the appointment was made.

Article 13 provides that the parties are free to agree on a procedure for challenging an arbitrator. Failing such agreement, a party shall submit its challenge in writing and with reasons to the tribunal which will then determine it, unless the arbitrator stands down. If a challenge is unsuccessful, it may be referred to the High Court (IAA section 8(1)), whose decision is not subject to appeal. The arbitration proceedings may continue, with the challenged arbitrator participating, while such a referral is pending.

If an arbitrator becomes *de jure* or *de facto* unable to perform his or her functions and otherwise fails to act without undue delay, his or her mandate will be terminated if he or she stands down or if the parties agree on the termination. Any disputes in this respect can be referred to the High Court: Model Law Article 14.

Where the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed in accordance with the rules applicable to the appointment of the arbitrator being replaced: Model Law Article 15.

Sections 14(3) and (4) and 15–18 of the AA contain similar provisions in respect of domestic arbitrations.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

Section 25 of the IAA provides that an arbitrator shall not be liable for negligence in respect of anything done or omitted to be done in the capacity of an arbitrator, or any mistake in law, fact or procedure made in the course of arbitration proceedings or in the making of the arbitral award. Section 20 of the AA is identical.

3.2 Confidentiality of arbitration proceedings

3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

See section 3.2.4 below.

3.2.2 To what matters does any duty of confidentiality extend (eg does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

See section 3.2.4 below.

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

See section 3.2.4 below.

3.2.4 When is confidentiality not available or lost?

Parties in arbitration (and obviously arbitrators as well) have a duty to maintain the confidentiality of the proceedings and its documents. Relevant provisions are generally found in the institutional or procedural rules governing the arbitration. For example, Rule 21 of the SIAC Rules provides that, unless the parties agree otherwise, all arbitral proceedings shall be in private and any recordings, transcripts or documents used shall remain confidential. Rule 35 provides that the parties and the Tribunal shall at all times treat all matters relating to the proceedings (including the existence of the proceedings, the pleadings, evidence and other materials produced in the arbitration and the award, unless already in the public domain) as confidential and that they shall not, without the prior written consent of all the parties, disclose any such matter to a third party except:

- for the purposes of making an application to a competent court of any state to enforce or challenge the award;
- pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
- for the purposes of pursuing or enforcing a legal right or claim;

- in compliance with the provisions of the laws of any state which are binding on the party making the disclosure;
- in compliance with the request or requirement of any regulatory body or other authority; or
- pursuant to an order by the tribunal on application by a party with proper notice to the other parties.

A tribunal may sanction breaches of confidentiality by making costs or other orders: Rule 35.4.

Sections 22 and 23 of the IAA and sections 56 and 57 of the AA provide that court proceedings in respect of arbitral proceedings may be heard in closed court and be subject to reporting restrictions.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

Where a party to an arbitration agreement to which the IAA applies commences court proceedings in Singapore against another party to the agreement in respect of any matter which is subject to the agreement, any party may apply to the court to stay those proceedings. The court shall stay those proceedings unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed: IAA section 6. The requirement to stay the court proceedings is mandatory. The exceptions to this requirement are construed narrowly and the list set out in the IAA is exhaustive.

By contrast, a court in a similar position in respect of an arbitration agreement to which the AA applies has a discretion to stay its proceedings which may be exercised if it is satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the arbitration agreement and the party applying for a stay was and remains ready and willing to pursue the arbitration: AA section 6.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

The courts will not, absent exceptional circumstances, order a stay of Singapore arbitral proceedings on jurisdictional grounds as tribunals are entitled to determine their own jurisdiction in the first instance. The courts may, however, in certain circumstances order a party not to take steps in an arbitration commenced in breach of an arbitration or other jurisdiction agreement. The stay of arbitral proceedings is otherwise a matter for the tribunal itself in the exercise of its power to conduct the arbitration in such manner as it considers appropriate: Model Law Article 19(2); AA section 23(2).

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

In respect of legal proceedings commenced in Singapore in breach of an

arbitration agreement, see 3.3.1 above. IAA section 6 also extends to non-Singaporean arbitration agreements.

If foreign proceedings are brought in breach of an agreement to arbitrate in Singapore, the Court can grant 'anti-suit' injunctive relief: see, eg *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603. However, foreign proceedings to obtain security will not be restrained by anti-suit relief where there is good reason for the institution of those foreign proceedings: *Regalindo Resources Pte Limited v Seatrek Trans Pte Limited* [2008] 3 SLR 930.

3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

The IAA, together with the Model Law, gives effect to an overriding principle of judicial non-intervention in arbitral proceedings. There is greater scope for judicial intervention in domestic arbitral proceedings but the AA is nevertheless still premised on the principle that the court should intervene only in limited circumstances, generally where it is necessary to support the arbitral process agreed by the parties.

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

No. The requirements for recognition and enforcement of arbitration agreements and awards are considered elsewhere in this chapter.

3.4 Procedural flexibility and control

3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

See 3.4.3 below.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

The parties are free to agree on the seat. Failing such agreement, the arbitral tribunal may determine the seat having regard to the circumstances of the case, including the convenience to the parties. Notwithstanding that the seat may be Singapore, the tribunal may, unless otherwise agreed by the parties, conduct some or all of the proceedings at any place which it considers appropriate: Model Law Article 20.

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

Subject to the mandatory provisions of the Model Law, the parties are free to agree on the procedure to be followed by the tribunal in an international arbitration. Failing such agreement, the tribunal may, again subject to the provisions of the Model Law, conduct the arbitration in such manner as it considers appropriate: Article 19. Article 18 requires the Tribunal to

treat the parties with equality and to ensure that each party is given a full opportunity to present its case. Article 24(2) requires the parties to be given sufficient advance notice of any hearings or meetings of the tribunal and Article 24(3) requires that any statements, documents or other information supplied to the tribunal by one party be communicated to the other party and also that any expert report or evidentiary document on which the tribunal may rely in making its decision be communicated to all of the parties. The Model Law also provides for specific powers, a number of which are considered elsewhere in this chapter, including in respect of the taking of evidence, the appointment of experts, and default awards. The IAA gives an international arbitration tribunal a number of additional powers, unless the parties agree otherwise, including to administer oaths to and take affirmations of the parties and witnesses, to adopt if it considers it appropriate inquisitorial processes, and to render partial awards: sections 12(2), (3), and 19A.

Sections 22, 23, 25, 28 and 33 of the AA are to similar effect in respect of domestic arbitrations. Section 26 permits a tribunal to order that arbitration proceedings be consolidated or heard concurrently but only if the parties so agree. The IAA is silent on this point.

3.4.4 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage? What are the rules on oral (factual or expert witness) evidence?

There are no specific rules of evidence for the purposes of arbitration proceedings. Subject to any mandatory rules relating to matters of evidence in the Model Law or the AA (see 3.4.3), the parties are free to agree on all matters relating to the gathering and tendering of written evidence. Institutional arbitral rules often contain detailed provisions. The IBA Rules on Evidence are frequently referred to for guidance in international arbitrations in Singapore.

Subject to any mandatory rules, the parties are free to agree on the rules of disclosure. In the absence of such agreement, it will be for the tribunal to determine the appropriate procedure: Model Law Article 19; AA section 23. Disclosure in arbitration is typically, although not necessarily, less extensive than in litigation. Parties also have the option to submit the documents upon which they wish to rely at the pleading stage, whereas this is not generally the case in litigation.

Again, subject to any mandatory procedural rules, the parties are free to agree on the rules relating to the giving of evidence, including whether oral proceedings are to be held and, if so, what form they will take. Where oral hearings take place, cross-examination is the norm. Section 12(3) of the IAA provides that, unless the parties agree otherwise, a tribunal may, if it thinks fit, adopt inquisitorial processes. The AA does not contain a similar provision. Both the Model Law (Article 26) and the AA (section 27) permit tribunals, unless the parties otherwise agree, to appoint experts on their own initiative and require the parties to provide relevant information or documents to them.

Section 12 of the IAA and section 28 of the AA give tribunals power to make orders or give directions to the parties for discovery of documents, service of interrogatories, and giving of evidence by affidavit. All such orders or directions may, with the permission of the court, be enforceable as if they were orders made by the court, including by way of proceedings for contempt of court.

As arbitral tribunals only have jurisdiction over the parties, they will not have power to compel the attendance of witnesses or the production of documents by non-parties. Article 27 of the Model Law, however, provides that the tribunal or a party with the approval of the tribunal may request from a competent court assistance in taking evidence. This power is supplemented by sections 13 and 14 of the IAA which provide that the tribunal or a party may apply to the court for a subpoena compelling a person who is within Singapore to attend before an arbitral tribunal to give evidence and/or produce specified documents. An order will only be made if the evidence is necessary for a fair disposal of the issues in the arbitration. An order in relation to documents will only require the production of specific documents and cannot be sought in order to obtain general disclosure from a non-party. A subpoena may not require the production of documents or the giving of evidence where the same could not be compelled in court proceedings. Accordingly, a witness is entitled to invoke privilege or confidentiality.

There are provisions to similar effect in the AA: section 30.

With regards to special provisions for arbitrators appointed pursuant to international treaties, in accordance with the ICSID Convention, except if parties otherwise agree, the arbitral tribunal may order discovery if it deems it necessary at any stage of the proceedings: Article 43.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

Pursuant to amendments made in 2004 to section 35 of the Legal Profession Act, there are no restrictions on persons representing any party in arbitration proceedings or in respect of the giving of advice, preparation of documents and any other assistance in relation to or arising out of arbitration proceedings once they have been commenced. This is so irrespective of whether or not the applicable law in respect of any issue arising in the arbitration is Singapore law. However, absent exceptional circumstances, foreign counsel are not permitted to appear in the Singaporean courts on any matter relating to arbitration proceedings.

3.5 The award

3.5.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?

Unless the parties have agreed otherwise, where a party fails to appear at a hearing or to produce documentary evidence without showing sufficient cause, a tribunal may continue the proceedings and make an award on the evidence before it: Model Law Article 25(c); AA section 29(2)(c).

Subject to any contrary agreement between the parties, an application to adjourn a hearing may be made at any time and will be determined by the tribunal in accordance with its general procedural powers. There are no specific provisions in relation to applications made shortly before a hearing, however, the timing of such an application will inevitably be taken into account.

3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, eg punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?

Article 28 of the Model Law provides that a tribunal shall, in an international arbitration, decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute or, failing such a choice, by the law as determined by the tribunal applying the conflicts of laws rules which it considers applicable. Section 12(5)(a) of the IAA provides, without prejudice to Article 28 of the Model Law, that a tribunal in an international arbitration may award any final remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings before that court. As a matter of Singapore law, there is no bar on a tribunal ordering specific performance or the rectification of a written agreement or making an award for the payment of punitive or exemplary damages, although the latter are not commonly awarded as a matter of Singapore law and practice, and awards of such damages could potentially be regarded as being contrary to public policy and, therefore, liable to be set aside or not be enforceable in Singapore. Tribunals may award interest and costs, subject to any agreement to the contrary between the parties: sections 12(5)(b), 20 and 21(1). Tribunals may also order a wide range of interim measures including interim injunctions: IAA section 12(1).

Tribunals in domestic arbitrations have equivalent powers, save in respect of interim injunctions: AA sections 28, 32, 34, 35 and 39.

3.5.3 Must an award take any particular form or are there any other legal requirements, eg in writing, signed, dated, place stipulated, the need for reasons, method of delivery, etc?

Awards must: be made in writing; be signed by the arbitrator or arbitrators (or by a majority of the arbitrators provided that the reason for omission of any signature is stated); state the reasons upon which it is based unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms; and state its date and the place of arbitration. A copy must be delivered to each party: Model Law Article 31; AA section 38.

3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

See section 3.5.6 below.

3.5.5 What matters are included in the costs of the arbitration?

See section 3.5.6 below.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

In respect of international arbitrations, the parties are free to agree as to the tribunal's power to award costs and as to what costs are to be regarded as recoverable. Subject to such agreement, any applicable institutional or other procedural rules, and any relevant rules of the substantive law governing the issues in dispute in the arbitration, a tribunal may order the unsuccessful party to pay some or all of the successful party's costs. Such costs may include the successful party's legal costs and disbursements, the arbitrators' fees and expenses, and the fees and expenses of any institution involved in the arbitration. The costs of corporate or in-house counsel or business executives are not necessarily excluded but they may not be recoverable if they would have been incurred in any event.

The position is generally the same in respect of domestic arbitrations, however, sections 39(2) and (3) of the AA provide that, except where an agreement to submit to arbitration a dispute which has arisen before the making of such agreement so provides, any provision in an arbitration agreement to the effect that the parties or any party shall in any event pay their own costs of the reference or award or any part thereof shall be void.

3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

If the arbitrator is not resident in Singapore, income derived from acting as an arbitrator in Singapore is exempt from tax, provided that the arbitrator does not act as an arbitrator in Singapore for more than 183 days in any year.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form and/or content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

For international arbitration, an arbitration agreement must be in writing and must satisfy Article 7 of the Model Law. An agreement may be in an arbitration clause in a contract or in a separate agreement. An agreement will be in writing if it is contained in a document signed by the parties, or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract. An agreement made by electronic communications will be sufficient provided that the information contained therein is accessible so as to be usable for subsequent reference: IAA section 2(1).

Section 2(3) of the IAA supplements Article 7 by providing that where, in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case, or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings.

Section 2(4) of the IAA provides that a reference in a bill of lading to a charterparty or some other document containing an arbitration clause shall constitute an arbitration agreement if the reference is such as to make that clause part of the bill of the lading.

Notwithstanding the limited requirements in the IAA and the Model Law, it is advisable that an arbitration agreement provide also for the seat of the arbitration, the procedural rules to govern the arbitration, the number and qualifications of the arbitrators and how they are to be appointed, and the language of the arbitration.

Section 4 of the AA is to similar effect in respect of agreements for domestic arbitrations.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

Singapore law accepts the concept of severability of the arbitration agreement from the contract of which it forms a part. Article 16(1) of the Model Law provides, in respect of international arbitrations, that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract and that a decision by the tribunal that the contract is null and void does not entail in and of itself the invalidity of the arbitration clause. Sections 21(2) and (3) of the AA are to the same effect in respect of domestic arbitrations.

3.6.3 Can an arbitral tribunal determine its own jurisdiction ('competence–competence')? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?

Singapore law embraces the concept of competence-competence, and arbitral tribunals, both domestic and international, may determine their own jurisdiction: Model Law Article 16(1); AA section 21(1). This power extends to ruling on objections to the existence or validity of the arbitration agreement. A tribunal may rule on an objection to its jurisdiction either as a preliminary question or in an award on the merits: Model Law Article 16(3); AA section 21(8).

If a tribunal rules as a preliminary question that it has jurisdiction, any party may refer the question to the High Court: Model Law Article 16(3), read with Article 6 and IAA section 8(1); AA section 21(9). The tribunal may continue the arbitration proceedings, even through to an award, while the question of its jurisdiction is pending before the courts.

The courts may also be required to deal with the question of a tribunal's jurisdiction upon an application by a party for a stay of court proceedings

alleged to have been commenced in breach of an arbitration agreement, upon an application to set aside an award made in Singapore, or where a party seeks to resist enforcement in Singapore of a foreign award.

3.6.4 Is arbitration mandated/prohibited for certain types of dispute?
There is no specific prohibition on the submission of certain types of dispute to arbitration. Article 1(1) of the Model Law, however, provides that the Model Law applies to 'commercial' matters. This term is to be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Section 11(1) of the IAA provides that any dispute may be submitted to arbitration unless it is contrary to public policy to do so. In *Aloe Vera of America Inc v Asianic Food (S) Pte Limited* [2006] 3 SLR 174 it was said 'issues, which may have public policy elements, may not be arbitrable, for example citizenship or legitimacy of marriage, grants of statutory licences, validity of registration of trade marks or patents, copyrights, winding up of companies.' Section 11(2) of the IAA further provides that the fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration. There is no equivalent provision in the AA.

Arbitration is not mandated for any particular type of dispute.

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?
Arbitration proceedings must be commenced within the limitation periods set out in the Limitation Act which apply equally to arbitration proceedings as they apply to the commencement of proceedings before any court: IAA section 8A; AA section 11. In general terms, the limitation period is six years from the date on which the cause of action accrued which, in the case of a contract, will be the date of breach. Parties may agree to reduce the limitation period. However, there are exceptions and special provisions so specialist advice may be required.

The Singapore government is presently considering whether to enact a Foreign Limitation Periods Act which would clarify the issue of which country's limitation laws would apply to disputes that are litigated or arbitrated in Singapore but which are governed by the law of another jurisdiction.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?
Singapore law does not generally enable arbitral tribunals to assume jurisdiction over third parties and third parties cannot be forced to participate in an arbitration against their will. However, procedural rules may permit a consenting third party to be joined to the proceedings if the parties also consent. For instance, Rule 24(b) of the SIAC Rules provides that, upon the application of a party, a tribunal may allow one or more third parties to be

joined in the arbitration, provided that such person is a party to the arbitration agreement and gives its consent in writing. The tribunal will then be permitted to make a single final award or separate awards in respect of all parties.

3.7 Applicable law

3.7.1 How is the substantive law governing the issues in dispute determined?

In both international and domestic arbitrations, the tribunal shall determine the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. In the absence of such a choice, which may be express or implied, the tribunal shall apply the law as determined by the conflict of law rules which it considers applicable: Model Law Articles 28(1) and (2); AA sections 32(1) and (2). If the parties agree, a tribunal may also decide *ex aequo et bono* or *as amiable compositeur* (Model Law Article 28(3)) or in accordance with such other considerations as are agreed by the parties or determined by the tribunal (AA section 32(3)). Article 28(4) of the Model Law provides that the tribunal shall decide the dispute in accordance with the terms of the contract and shall take into account any relevant trade customs.

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

There are a number of mandatory procedural rules in both the IAA and the AA: see 3.4.3.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1.1 Can an arbitral tribunal order interim relief? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

See section 4.1.2 below.

4.1.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

Tribunals can order interim relief in both domestic and international arbitrations. In domestic arbitrations, tribunals can, subject to the agreement of the parties make orders or give directions for: security for costs; preservation and interim custody of evidence; the taking of samples from and observations and experiments on property; and the preservation, interim custody or sale of property: AA section 28(2).

In international arbitrations, tribunals have additional powers to make orders or give directions for: securing the amount in dispute; ensuring that any award is not rendered ineffectual by the dissipation of assets by a party; and interim injunctions or other interim measures: IAA section 12(1). Section 12(1) is without prejudice to Article 17 of the Model Law which grants tribunals the power, subject to any agreement to the contrary, to order interim measures of protection in respect of the subject matter of the dispute.

Article 17A of the Model Law sets out the conditions for granting interim measures. The party seeking the measure must generally satisfy the tribunal that:

- harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

Interim measures in respect of the preservation of evidence are to be made only to the extent that the tribunal considers appropriate: Model Law Article 17A(2).

4.1.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

A court may grant interim relief in support of international arbitration proceedings on the same basis as if the substantive proceedings were before the court. The interim measures are the same as those that may be ordered by an arbitral tribunal under section 12 of the IAA (see 4.1.1 above) with the exception of orders for security for costs: section 12A(2). A court will only grant interim relief if or to the extent that the arbitral tribunal, or any arbitral institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively: section 12A(6). Any order made by the court will cease to have effect if the arbitral tribunal or other institution of person vested with power makes an order which expressly relates to the order made by the court: section 12A(7).

In respect of domestic arbitrations, section 31 of the AA provides that the court shall have, for the purposes of and in relation to a domestic arbitration, the same power to make orders in respect of any of the matters set out in section 28 as it has for the purpose of and in relation to actions in court, and, additionally, will have power to secure the amount in dispute, to ensure that any award which may be made is not rendered ineffectual by the dissipation of assets, and to grant interim inunctions or other interim measures. Any such order made by a court will cease to have effect if the arbitral tribunal or other person vested with relevant power makes an order relating to the order made by the court: section 31(2). Section 31(3) requires the court, in exercising its power in respect of a domestic arbitration, to have regard to any application made before the tribunal and any order made by the tribunal in respect of the same issue.

4.1.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

A court may order interim relief in support of foreign arbitrations on the same terms as it may in respect of international arbitrations, save that the court may refuse to do so if, in its opinion, the fact that the place of arbitration is or is likely to be outside Singapore makes it inappropriate to make such order: IAA section 12A(3). This provision, which came into force

on 1 January 2010, now permits the courts to order freezing injunctions (as well as other interim measures) in support of foreign arbitrations, an outcome which overturns the decision reached by the Court of Appeal in *Swift-Fortune Limited v Magnifica Marine SA* [2007] 1 SLR 629.

5. CHALLENGING ARBITRATION AWARDS

5.1.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

See section 5.1.3 below.

5.1.2 Can the parties exclude rights of appeal or challenge?

See section 5.1.3 below.

5.1.3 What are the provisions governing modification, clarification or correction of an award (if any)?

International awards are final and binding on the parties subject to the right to challenge the award by any available process of appeal or review provided for in the IAA and the Model Law: IAA, section 19B.

Article 34(2) of the Model Law provides that an award may be set aside by the High Court upon an application by a party only on limited grounds which mirror those upon which a court may refuse to enforce a foreign award pursuant to the New York Convention.

Any application must be made within three months of the date on which the party making it received the award or any further award or decision made by the tribunal pursuant to Article 33 of the Model Law.

Section 24 of the IAA adds that the courts may also set aside an international award if the making of the award was induced or affected by fraud or corruption, or a breach of the rules of natural justice occurred in connection with the making of the award, by which the rights of any party have been prejudiced.

Section 48 of the AA provides an equivalent power in respect of domestic awards.

There is no right of appeal in respect of errors of law in relation to international awards. However, section 49 of the AA provides that a party may appeal to the High Court on a question of law arising out of a domestic award, unless the parties have agreed otherwise. An appeal requires the agreement of all parties or the permission of the court, and any available arbitral process of appeal or review must first be exhausted. The permission of the court shall only be given if the court is satisfied that:

- the determination of the question will substantially affects the rights of one or more parties;
- the question is one which the arbitral tribunal was asked to determine;
- on the basis of the findings of fact in the award (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is open to serious doubt; and

- despite the agreement of parties to resolve the matter by arbitration, it is just and proper in all the circumstances of the case for the court to determine the question.

In respect of both domestic and international awards, a party may request the tribunal to correct any clerical, typographical or computational errors and/or, if the parties agree, request the tribunal to give an interpretation of a specific point or part of the award: Model Law Article 33(1); AA section 43(1). The parties may also request the tribunal to make an additional award as to claims presented during the proceedings but omitted from the award: Model Law Article 33(3); AA section 43(4).

Although the parties are free to agree to exclude a right of appeal to the courts in respect of an error of law in a domestic award, they cannot presently agree to exclude the other rights of recourse just mentioned. The Singapore government is presently considering whether or not the IAA should be amended to allow the parties, by agreement, to waive their right to set aside international arbitration awards.

6. ENFORCEMENT

6.1.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

See section 6.1.3 below.

6.1.2 What are the procedures and standards for enforcing an award in your jurisdiction?

See section 6.1.3 below.

6.1.3 Is there a difference between the rules for enforcement of 'domestic' awards and those for 'non–domestic' awards?

Awards, both domestic and international, may with the permission of the courts, be enforced in the same manner as a judgment or order of the court. The application for permission is to be made in the manner prescribed in the Rules of Court and must include copies of the award and the arbitration agreement.

Foreign awards are enforceable in Singapore under Part III of the IAA (and not Part VIII of the Model Law) which effectively incorporates the New York Convention into domestic law. They may be enforced in the same manner as awards made in Singapore. Certain foreign awards (principally those made in Commonwealth countries) may also be enforceable under other legislation and ICSID awards are enforceable pursuant to the provisions of the Arbitration (International Investment Disputes) Act. Singapore's ratification of the New York Convention is subject to the reservation that the Convention will be applied only to the enforcement of awards made in the territory of other Contracting States.

Part III of the IAA provides that the party seeking permission to enforce a foreign award shall produce to the court originals or certified copies of the award and the arbitration agreement (with English translations if necessary). Section 31 sets out exhaustively the grounds on which a court may refuse

permission to enforce a foreign award in terms which mirror Art V of the New York Convention.

If permission to enforce an award as a judgment of the court is not resisted, the process is generally prompt and inexpensive. However, if permission is resisted, or if, permission having been given, an application is made to have that permission set aside, a full hearing may be required. The time and expense will necessarily depend on the nature and complexity of the issues that arise.